Office-Supreme Court, U.S.
FILED
JAN 16 1963
JOHN F. DAVIS, CLERK

U. S.

In The
Supreme Court of the United States

October Term, 1962

No. [redacted] 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

TOBIAS SIMON
Counsel for Appellants
233 Southeast First Street
Miami, Florida

SUBJECT INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTION PRESENTED	3
STATEMENT	3
THE FEDERAL QUESTION IS SUBSTANTIAL	6
CONCLUSION	12
CERTIFICATE OF MAILING	13
APPENDIX A	App. 1
APPENDIX B	App. 4

TABLE OF AUTHORITIES CITED

Cases

	Page
Garner v. *Louisiana* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961)	11
Lowell v. *Griffin* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938)	2
Marsh v. *Alabama* 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946)	9
Shelley v. *Kraemer* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)	6
Valle v. *Stengle* 176 F.2d 697 (1949)	7
Wieman v. *Updegraff* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952)	2
Winters v. *New York* 333 U.S. 507, 68 S.Ct. 665, 81 L.Ed. 1066 (1948)	2

STATUTES

	Page
FLORIDA STATUTES, Sec. 509.141	3, App. 4
TITLE 28 U.S. CODE, Sec. 1257(2)	2
R. S. 1977 (42 U.S.C.A. Sec. 1981)	8

In The
Supreme Court of the United States

October Term, 1962

No. _____

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida filed September 19, 1962 and set forth

herein and respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 144 So.2d 811, and said opinion is set forth in Appendix A hereto.

JURISDICTION

These proceedings began with a criminal information filed against Appellants by the State of Florida on August 17, 1960 pursuant to Florida Statutes, Sec. 509.141. Appellants were found by the Criminal Court of Record in and for Dade County, Florida, to have violated said Statute, and judgments were entered against them on August 26, 1960. Notice of Appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, was filed on September 21, 1960, and the judgments of the trial court were ultimately affirmed by the Supreme Court of Florida in its Order and Opinion filed September 19, 1962.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by Title 28 U. S. Code, Sec. 1257(2). Cases sustaining the jurisdiction of this Court are *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); *Winters* v. *New York*, 333 U.S. 507, 68 S.Ct. 665, 81 L.Ed. 1066 (1948); and *Lowell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

STATUTE INVOLVED

The validity of Florida Statutes, Section 509.141 is involved. Said Statute is set forth in Vol. 2, 1961 Florida Statutes, page 2257; and is set forth in Appendix B hereto.

QUESTION PRESENTED

Where a group of Negroes and white persons in association with Negroes remain in a private restaurant after the manager thereof has refused to serve them and has requested them to leave the premises; and where the manager's refusal to serve and his request to leave is based upon the fact that said group comprises Negroes and persons in association with Negroes; and where the police, at the manager's request, arrest said group of persons because of their refusal to comply with the manager's request to leave the premises; is the arrest and subsequent conviction of this group of persons for alleged violation of Florida Statutes Section 509.141 a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and a violation of the privileges and immunities of State and Federal citizenship guaranteed by the Federal Constitution?

STATEMENT

The State of Florida filed an information against Appellants which charged that on August 17, 1960 they did, in Miami, Florida:

> "unlawfully remain or attempt to remain in a restaurant after being requested to depart there-

from in violation of Section 509.141(3), Florida Statute, in that the above-named defendants at the aforesaid time and place did then and there enter the premises located at 5941 Northwest 7th Avenue, in the County and State aforesaid, said premises being then and there owned and operated by SHELL CITY, INC., a Florida Corporation, and which said premises were then and there being operated as a restaurant under the name SHELL CITY RESTAURANT; that the above-named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart therefrom by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (R. 2, 3)

Trial was held in the Criminal Court of Record in and for Dade County, Florida on August 26, 1960. Following the presentation of the State's case, Appellants moved for a judgment of acquittal, but their motion was denied (R. 61). The Appellants presented no evidence. The trial court then entered judgments pursuant to Flor-

ida Statutes, Chapter 948, wherein it ordered that an adjudication of guilt and the imposition of sentence be stayed, and placed Appellants on probation.

For the purposes of this Appeal, Appellants admit as true the material allegations of fact alleged by the State in its information, *supra*. However, additional evidence was adduced at the trial which Appellants submit shows that the arrests and convictions herein were in clear violation of Appellants' constitutional rights.

Appellants constituted a party of Negro and white persons, and the manager of the Shell City Restaurant admitted that the reason that he refused to serve Appellants and requested them to leave the premises is that the store did not serve Negroes, and that he therefore had Appellants expelled from the restaurant by the police because of this policy of racial discrimination (R. 40). The vice-president of Shell's also testified that there are nineteen departments in the store; that Negroes are invited to participate and make purchases in eighteen of these departments; but that they are not served in the nineteenth department, namely, the restaurant (R. 50-53).

The information did not charge, nor does the record contain any allegation or evidence that Appellants were boisterous, noisy or unruly or otherwise engaged in any disorderly conduct.

HOW FEDERAL QUESTION IS PRESENTED Appellants first raised the federal question in their motion for judgment of acquittal following the presentation of the State's case at the trial, wherein Appellants contended that they were deprived of the equal protection of the laws,

due process of law, and privileges and immunities guaranteed by the Federal Constitution, and the trial court ruled against Appellants on their motion (R. 61-62). Appellants again raised these questions in their Assignments of Error on Appeal from the judgments of the trial court (R. 17).

THE FEDERAL QUESTION IS SUBSTANTIAL

1. Appellants submit that the judgment below is in conflict with this Court's ruling in *Shelley* v. *Kramer*, 334 U.S. 1; 68 S. Ct. 836; 92 L.Ed. 1161 (1948), wherein a party to a racial restrictive covenant sought to enjoin the sale by one owner in a subdivision to a Negro purchaser. In refusing injunctive relief, this Court concluded that no arm of a State Government may exercise its coercive powers to effectuate racial discrimination at the behest of a private party. In the case at bar, Shell's City called upon the police of Miami to evict Appellants from the restaurant solely for the reason of racial discrimination. The police, aided by the Trial Court below, therefore effectuated this private party's racial policy by the arrests and convictions of the Appellants. In *Shelley*, this Court refused to permit a State agency to protect or effectuate a private party's property right in the form of contract, viz., the restrictive covenant. In the instant case, Appellants submit that the courts of Florida may not lend their coercive power to protect the alleged property right of Shell's City to refuse to serve or accommodate persons solely for the reasons that they are Negroes or in association with Negroes. The action of the police and the State courts, Appellants submit, amounts to State action in support of racial discrimination and therefore is a denial of the equal

protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

2. Appellants submit that the judgments below are in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Valle* v. *Stengle*, 176 F.2d 697 (1949). Plaintiffs there brought suit under the Civil Rights Act alleging a denial of rights guaranteed under the Fourteenth Amendment. Their complaint alleged that they were both Negroes and whites; that the defendants were the corporate owner of Palisades Amusement Park in New Jersey, the individual managers of the park and the local Chief of Police; that the park was privately and not publicly owned; that the park admitted members of the public upon payment of fees; that the park contained a pool and that persons admitted to the park were admitted to the pool upon the payment of an additional fee; that plaintiffs were admitted to the park and were in possession of duly purchased tickets; that plaintiffs were refused admission to the pool on the ground that their party contained Negroes; that the Chief of Police aided and abetted the managers and the corporate owner in refusing plaintiff's admission to the pool and aided and abetted the ejectment of plaintiffs from the park.

The District Court granted defendants' Motion to Dismiss the complaint, but was reversed on appeal. The Court of Appeals stated that the arrests were presumably pursuant to a state statute relating to minor breaches of the peace. 176 F.2d 697, 701. The Court then stated that:

> " . . . the plaintiffs were denied the equal protection of the laws within the purview of the Fourteenth Amendment because they were Ne-

groes or acting in association with Negroes when they attempted to gain admission to the pool at Palisades Park. They, or some of them, were ejected from the park, were assaulted and were imprisoned falsely, as alleged in the complaint, because they were Negroes or in association with Negroes, and were denied the right to make or enforce contracts, all within the purview of and prohibited by R. S. 1977." 176 F.2d 697, 702.

R.S. 1977 (42 U.S.C.A., § 1981) provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and proceedings for the security of persons and property as is enjoyed by white citizens".

The Court also held that there was a deprivation of the plaintiff's privileges and immunities, and stated that:

> "If a man cannot make or enforce a contract already made because of the interference of a State officer he is being denied a civil right . . . the liberty involved is in fact the liberty of contract . . . to refuse to an individual the liberty of contract is to put him beyond the pale of capitalism. Thus ostracized, he cannot engage in the acquisition of property or in the pursuit of happiness. It is clear that the Supreme Court has held that the words 'privileges and immunities' of Article IV, Section 2, protect the right of a citizen to engage in lawful commerce, trade or business without molestation or harassment

> . . . The field of human rights covered by the privileges and immunities clause is indeed a broad one. The individual defendants, acting in concert, if the allegations of the complaint are to be believed, have denied to the plaintiffs the privileges and immunities of citizenship." 176 F.2d 697, 703.

The Court added that:

> "the phrase 'to make contracts' of R.S. Section 1977 clearly shows that Congress had in mind much more than enforcing a contract, already made, by legal proceeding." 176 F.2d 697, 703.

The Court in *Valle* held that the right to solicit contracts may not be violated by State action where such action is prompted by the fact that the soliciting parties are Negroes or persons acting in association with Negroes. In the case at bar, Appellants were denied the right to engage in commerce with Shell's City and were denied such right because of the fact that they are Negroes or persons in association with Negroes. Appellants submit that these are parallel cases and the Court of Appeals for the Third District has announced a just and proper construction of the Constitution.

3. Petitioners submit that the judgments below are in conflict with the principle announced by this Court in *Marsh* v. *Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946). In *Marsh*, a member of Jehovah's Witnesses had distributed religious literature on the sidewalks of a so-called company-owned town, and had been arrested and convicted for violating a state statute prohibiting one from

entering or remaining on the premises of another after having been warned not to do so. This Court reversed the conviction as being a violation of freedom of the press and freedom of religion, and notwithstanding the fact that the acts proscribed by State law took place on privately-owned property. This Court stated that:

> "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute." 326 U.S. 501, 509, 90 L.Ed. 265, 270.

Likewise in the case at bar, Appellants submit that the State of Florida cannot justify the deprivation of Appellants' right to equal protection of the laws and cannot justify the enforcement of a policy of racial discrimination solely because Appellant's conduct, presence and acts occurred on private premises. In *Marsh* the Court stated that:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." 326 U.S. 501, 539, 90 L.Ed. 265, 270

Appellants submit that their rights to the equal protection of the laws and freedom from racial discrimina-

tion occupy the same "preferred position" as the rights which this Court protected in *Marsh* v. *Alabama*, *supra*. Moreover, as Mr. Justice Douglas stated in his concurring opinion in *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961):

> "Restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the states may not enforce a policy of racial segregation."

> "One can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. Whether retail stores, not licensed by the municipality, stand on a different footing is not presented here. But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."

CONCLUSION

For the foregoing reasons, Appellants submit that the questions here presented are substantial and of great public importance and warrant plenary consideration by this Court.

Respectfully submitted,

TOBIAS SIMON
Counsel for Appellants
233 Southeast First Street
Miami 32, Florida

CERTIFICATE OF MAILING

I, TOBIAS SIMON, Counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on January , 1963, I served copies of the foregoing Jurisdictional Statement on the Appellee, STATE OF FLORIDA, by mailing a Copy thereof in a duly addressed envelope with postage prepaid to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida, and by further mailing a copy thereof to the Honorable RICHARD IRVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

TOBIAS SIMON

Counsel for Appellants
233 Southeast First Street
Miami, Florida

APPENDIX A

OPINION OF SUPREME COURT OF FLORIDA, filed September 19, 1962 in JAMES RUSSELL ROBINSON, et al., v. THE STATE OF FLORIDA, 144 So.2d 811.

THORNAL, J.

This case finally reaches us by an order of the Circuit Court of the Eleventh Judicial Circuit transferring an appeal from a judgment of the Criminal Court of Record of Dade County which passed upon the validity of a state statute.

The case traveled here by a circuitous and devious route which is not approved and which should be meticulously avoided in the future. See, Robinson v. State, Fla. 1961, 132 So.2d 3.

Robinson and others were found to be guilty of a misdemeanor in the Criminal Court of Record of Dade County. In denying a motion for a directed verdict at the conclusion of the evidence, the trial judge expressly sustained the validity of Section 509.141, Florida Statutes. The cited statute makes it a misdemeanor for a person to refuse to leave a restaurant after being requested so to do. The judgment of the criminal court was appealed to the circuit court. It should have been brought directly here under Article V, Section 4, Florida Constitution, which provides for direct appeal to this Court from final judgments of trial courts "directly passing upon the validity of a state statute." Evidently, this provision was never brought to the attention of the circuit judge. Moreover, pursuant to requirements of the Constitution this Court has adopted Florida Appellate Rule 2.1a(5)(d), which reads in part as follows:

> "When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction . . . "

In the instant case the circuit court sat as an appellate court. Florida Appellate Rule 1.3. It is evident that the provisions of the foregoing rule were not invoked when this matter was originally before the circuit court in the exercise of its appellate jurisdiction. At that time the case should have been transferred immediately to this Court. In fact, it never should have been taken to the circuit court in the first instance. Robinson v. State, supra. Instead of being brought here directly, as the Constitution contemplates, the appeal took a tortuous route through the circuit court, thence by petition for certiorari to the District Court of Appeal which transferred to us the petition for certiorari. Whereupon, we were compelled, State v. Robinson, supra, to transfer the matter back to the District Court which in turn remanded it to the circuit court, which finally sent the original appeal to this Court where it should have been at the beginning of the appellate process.

Were we to condone this procedure it would be an invitation to litigants to ignore completely the requirements of the Constitution governing appeals. Litigants could merely follow the course which seemed to them to be most desirable, by selecting the appellate court of their own choice with the hope of finding somewhere along the line a decision suiting their desires.

In cases of the type now before us, the circuit court

at the outset had no jurisdiction to do anything but transfer the appeal here. Instead, it proceeded to attempt to exercise complete appellate jurisdiction. Under the procedure followed in this case we would doubtless be justified in dismissing this appeal on the ground that the appellants had elected to proceed to a conclusion in the wrong forum instead of seeking the benefit of Rule 2.1a(5)(b), and thereby getting on the right track to move forward to final adjudication in the forum which had the power to proceed.

However, inasmuch as the case is now finally here, we will proceed to dispose of it because we do have jurisdiction. We have included the foregoing discussion for the guidance of the Bar in the future, in the hope that there will be no repetition of the procedure which was undertaken in the instant case.

We find it unnecessary to engage in any prolonged discussion of the merits of the case. The sole point presented is the matter of the validity vel non of Section 509.141, Florida Statutes. We have concluded, as did the trial judge, that the statute is non-discriminatory and that it reflects a valid exercise of the legislative power of the State of Florida. Having so concluded, we find no reason to disturb the judgment of the Criminal Court of Record here under assault.

It is, therefore, affirmed.

It is so ordered.

ROBERTS, C. J., DREW, O'CONNELL and HOBSON (Ret.), JJ., concur

APPENDIX B

FLORIDA STATUTES, SECTION 509.141:

(1) The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel or apartment house, tourist camp, motor court, restaurant, rooming house or trailer court in the manner hereinafter provided, any guest of said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, who, while in said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court or such as to injure the reputation or dignity or standing of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or who, in the opinion of the management, is a person whom it would be detrimental to such hotel, apartment house, tourist camp, motor court, restaurant, rooming house, or trailer court for it any longer to entertain.

(2) The manager, assistant manager, desk clerk or other person in charge or in authority in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall first orally notify such guest that the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court no longer

desires to entertain him or her and request that such guest immediately depart from the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court. If such guest has paid in advance the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall, at the time oral or written request to depart is made, tender to said guest the unused or unconsumed portion of any such advance payment. Said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court may, if its management so desires, deliver to such guest written notice in form as follows:

> "You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."

(3) And any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises.

(4) In case any such guest, or former guest, of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or any other person, shall be illegally upon any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, the management, or any employee

of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, may call to its assistance any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court management, or hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court employee, forthwith and forceably, if necessary, to immediately eject from such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, any such guest, or former guest, or other person, illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, as aforesaid.